Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Inter-Carrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68

COMMENTS OF AT&T CORP.

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TABLE OF CONTENTS

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Pursuant to the Commission's Public Notice, FCC 00-227, released June 23, 2000, AT&T Corp. ("AT&T") respectfully submits these comments on the standards that should govern inter-carrier compensation for traffic bound for Internet Service Providers ("ISPs") under the terms of the Act and the D.C. Circuit's decision in *Bell Atlantic Tel. Cos.* v. *FCC*, 206 F.3d 1 (D.C. Cir. 2000).

INTRODUCTION AND SUMMARY

As the Commission has recognized, both settled law and sound economics and policy dictate that a local exchange carrier ("LEC") that delivers a voice or data call originated by a customer of another LEC is entitled to cost-based compensation from the originating carrier. LECs use the same facilities in the same manner – and thus incur the same costs – delivering traffic to their dial-up ISP customers as they do delivering voice and data traffic to their other customers. And incumbent LECs have failed, despite countless opportunities before state commissions, federal courts and the Commission, to document any relevant cost differences that could justify singling out ISP-bound traffic for disparate compensation treatment.

The incumbents have nonetheless for years balked at paying any compensation at all to other LECs who deliver their dial-up ISP-bound calls, despite the costs these calls impose on the other LECs and the corresponding windfalls enjoyed by the incumbents, who would otherwise have to complete those calls themselves. State commissions and courts have almost uniformly rejected the incumbents' constantly shifting excuses for non-payment, but, in the absence of definitive guidance from the Commission, the incumbents continue to insist that they need not pay for the costs they impose. The uncertainty and costs generated by the incumbents' intransigence in this regard are potent barriers to competitive entry – carriers have quite literally been driven to the brink of bankruptcy by the incumbents' refusal to pay. This proceeding presents an opportunity for the Commission to finally put an end to this needless and anticompetitive controversy. As demonstrated below, the Commission should exercise its clear jurisdiction over ISP-bound traffic and rule that LECs must compensate each other for the delivery of ISP-bound traffic at the same cost-based rates that state commissions (and carriers) establish under 47 U.S.C. § 251 for the delivery of local voice and data traffic.

In its *Declaratory Ruling* last year,[1] the Commission concluded that the terms of § 251(b)(5) of the Act do not mandate the payment of compensation from the LECs who originate Internet-bound calls to the LECs who serve the ISPs and deliver traffic to them. In particular, the Commission had previously adopted a rule that construed § 251(b)(5)'s "reciprocal compensation" requirements as applicable not to the transport and termination of all

[1] Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98 and 99-68, 14 FCC Rcd. 3689 (1999), *vacated and remanded, Bell Atlantic Tel. Cos.* v. *FCC*, 206 F.3d 1 (D.C. Cir. 2000). In these comments, AT&T will refer to the Declaratory Ruling portion of this publication as the *Declaratory Ruling*, and the Notice of Proposed Rulemaking portion as the *NPRM*.

"telecommunications" (as the statute provides), but only to "local" calls. In its *Declaratory Ruling*, the Commission concluded that, under this construction, compensation for Internet-bound traffic is not mandated by § 251(b)(5), because this traffic is jurisdictionally interstate and, therefore in the Commission's view, cannot be "local" within the meaning of its regulation. However, while concluding that the statute did not mandate reciprocal compensation for this traffic, the Commission provided that, until such time as it adopted a specific scheme for compensation: (i) LECs should continue to pay, and receive, compensation pursuant to the provisions of the interconnection agreements that were negotiated and arbitrated under the cost-based standards of §§ 251 and 252 of the Act; and (ii) state commissions would remain free to continue to require such compensation in arbitrating new interconnection agreements pursuant to § 252.

In *Bell Atlantic*, the D.C. Circuit vacated this order and remanded for further consideration. The Court did not question – and effectively endorsed – the Commission's determination that ISP-bound traffic, because it is jurisdictionally interstate under the applicable "end-to-end" analysis, overwhelmingly results in communications between the calling party and websites located in different states. However, the Court noted that this established only that "a call is in the interstate *jurisdiction*" and therefore cannot be subjected to state commission regulation under state law. As the Court stated, it by no means followed that Internet-bound calls are not also subject to § 251(b)(5)'s *federal* standards for payment of cost-based inter-carrier compensation. The Court held that the Commission had not explained why "it made sense in terms of the statute or the Commission's own regulations" to exclude ISP-bound calls from federal reciprocal compensation merely because they are jurisdictionally interstate.

In this regard, the Court noted that the Commission has always acknowledged that calls to information services providers are jurisdictionally interstate, but recognized that such calls are unlike ordinary long distance calls. The Commission has thus treated these calls as "local" for purposes of determining the appropriate compensation for the local exchange carriers that carry the calls to the networks of information service providers.

In these comments, AT&T urges the Commission to adopt precisely this approach here. Although there is no doubt that this traffic is interstate in character and cannot be regulated under state law, this jurisdictional issue does not resolve the central issue in this proceeding: the inter-carrier compensation obligations for ISP-bound traffic. Cost-based reciprocal compensation for the delivery of ISP-bound traffic on a uniform basis with "local" voice and data traffic is compelled by the terms and purposes of § 251(b)(5) of the Act and is further consistent with the Commission's prior decisions that the same traffic is not subject to exchange access charges. Alternatively, even if the Commission were to conclude that the traffic is outside § 251(b)(5), the Commission should adopt a federal rule requiring compensation for the delivery of ISP-bound traffic at the same cost-based rates that state commissions (or the parties through negotiation) determine should be applied to other voice and data traffic. LECs use the same facilities in the same manner and incur the same costs in delivering ISP-bound calls and concededly "local" calls, and there simply is no non-arbitrary basis for treating ISP-bound traffic differently than traffic that is the same in all relevant respects.

These comments are divided into three parts. Part I will explain that calls to ISPs are integral to continuous interstate communications and are thus within the Commission's jurisdiction over interstate communications. Part II demonstrates (i) that the terms of the Act mandate reciprocal compensation for these calls, (ii) that the reason for excluding ordinary long distance calls from the reach of § 251(b)(5) are inapplicable to ISP-bound traffic, and (iii) that it would be consistent with the Commission's prior practice to treat ISP-bound traffic as interstate for jurisdictional purposes, but "local" for purposes of inter-carrier compensation. Finally, Part III demonstrates that even if § 251(b)(5) were deemed inapplicable, the Commission can and should both adopt federal standards mandating the payment of compensation at cost-based rates, and, to avoid needless federal proceedings, require that carriers pay each other for ISP-bound traffic at the same cost-based rates established through negotiation or arbitration under §§ 251 and 252 for other voice and data traffic.

I. ISP-BOUND CALLS ARE JURISDICTIONALLY INTERSTATE AND THEREFORE CANNOT BE REGULATED UNDER STATE LAW.

The Public Notice (p. 3) requests comment "on the jurisdictional nature of ISP-bound traffic." This issue, strictly speaking, is not one that was "identified by the court in its decision." But there is no question that the ISP services, and LECs' carriage of ISP-bound traffic, are within the Commission's jurisdiction over interstate communications by wire or radio.

In *Bell Atlantic*, the Court accepted the Commission's determination that ISP-bound calls are jurisdictionally interstate services. Specifically, as the Commission had found, calls to ISPs typically result in direct, nearly instantaneous communications between the calling party and one or more websites located in other states. Under the well-settled "end-to-end" analysis that governs the determination of the scope of the Commission's jurisdiction, the D.C. Circuit accepted that this single undisputed fact establishes that ISP services, and the LECs' carriage of ISP-bound calls, are "interstate communications by wire or radio" and are within the jurisdiction of the Commission. *See Bell Atlantic*, 206 F.3d at 5, 7 ("[t]here is no dispute that the Commission has historically been justified in relying on [the end-to-end] method when determining whether a particular communication is jurisdictionally interstate" and that the "end-to-end analysis" is "sound" for "jurisdictional purposes").

The sole basis for the D.C. Circuit's remand was its holding that the sound "arguments supporting use of the end-to-end analysis in the jurisdictional analysis [over ISP-bound calls] are not obviously transferable to th[e different] context" of determining the application of § 251(b)(5). For that reason, the Court ruled that the exclusion of ISP-bound traffic from the statutory reciprocal compensation requirements therefore could be upheld (if at all) only if further explanation and analysis were provided on remand. *Id.* at 6.

At the same time, in making the latter point, the successful petitioners and the D.C. Circuit noted a number of factual differences between ordinary interstate long distance services and the services that ISPs offer to their customers. Although these petitioners' factual claims may demonstrate that ISP-bound traffic should be regulated differently than other interstate traffic, they do *not* suggest or mean that the Commission's jurisdictional determination was incorrect. For example, petitioners asserted that ISPs are "no different" from "'pizza delivery firms, travel reservations agencies, credit card verification firms, or taxicab companies, which use a variety of communications services to provide their goods or services to their customers.'" *Bell Atlantic*, 206 F.3d at 7. But the D.C. Circuit emphasized here, too, that it was holding only that the "Commission has not satisfactorily explained why an ISP is not, *for purposes of reciprocal compensation*, 'simply a communications-intensive business end user selling a product to other consumer and business end users.'" *Id.* (emphasis added). The Commission's jurisdiction was not questioned, and ISPs and pizza delivery firms (the latter of which *are* the end-points of the wire communications) are very different for jurisdictional purposes.

In all events, there is no question that ISP services, and the LECs' carriage of ISP-bound traffic, are within the Commission's jurisdiction over interstate communications by wire or radio. The facts that establish this jurisdiction are very straightforward, and were a basis for the Commission's recent determination that DSL services are "exchange access" when they originate communications to out-of-state web sites.

ISPs lease, or sometimes own, interexchange facilities that connect their local servers and nodes to their own centralized computers (where their proprietary content may be stored) and to the Internet backbone facilities that, directly or indirectly, provide connections to all the websites on the public Internet. In addition to the use of DSL, cable, or other dedicated connections to an ISP, customers can access the ISPs' networks of interexchange facilities by dialing the local telephone number of the ISP's local node or servers. That local call, strictly speaking, is routed to the central office of the LEC that serves the ISP, where the call is switched onto a private line that leads to the ISP's local server (which generally consists of a modem bank and router). Regardless of where this local server is located, the ISP's local server is a packet switch that routes communications from the calling party to one or more centrally-located computers on the ISP's network or to one or more websites on the public Internet. The Court noted that in a "single session" with an ISP, "an end user customer may communicate with multiple destination points, either sequentially or simultaneously," and the Court accepted the Commission's prior finding that "'a substantial portion of Internet traffic involves accessing interstate or foreign websites.'" *Bell Atlantic*, 206 F.3d at 5.

Notably, during each session, the local exchange carrier facilities establish an open circuit between the end user customer and the ISP. Information travels over these local facilities as part of the communications between the end user and each of interstate or foreign websites that the end user contacts. The local exchange facilities are thus essential links in a series of sequential or simultaneous interstate, end-to-end communications, each of which occurs between the end users and interstate destinations. While the end user is obtaining an information service, the local exchange carriers are providing pure transmission for an interstate communication.

In these circumstances, there is no question that the ISPs' services, and the LECs' carriage of ISP-bound traffic, are jurisdictionally interstate services. The Act gives the FCC jurisdiction over "interstate or foreign communication by wire or radio" (47 U.S.C. § 201(a)), and "wire communications" is defined as "transmission of writing, signs, signals, pictures, and sounds of all kinds by aid of wire, cable, or other like connection between *points of origin and reception* of such transmission, including the instrumentalities, facilities, apparatus, and *services (among other things, the receipt, forwarding and delivery of communications) incidental to such transmission*." 47 U.S.C. § 153(52) (emphasis added). Under the plain terms of this definition, the existence of an ISP server or other intermediate points of switching and exchange – *i.e.*, "the receipt, forwarding, and delivery of communications incidental to such transmission" – does *not* serve to divide the call into separate communications. The courts and the Commission have thus uniformly held that in determining whether a call is intrastate or interstate in nature, one must examine the endpoints of the communication and ignore any intermediate points of switching or exchanges. *See, e.g., New York Tel. Co.* v. *FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980); *United States* v. *AT&T*, 57 F. Supp. 451, 453-55 (S.D.N.Y. 1944), *aff'd*, 325 U.S. 837 (1945).

The Commission and the federal courts of appeals have similarly long held that the provision of enhanced or information services across state lines constitutes interstate communication by wire or radio and is within the FCC's jurisdiction. *See, e.g., Amendment of*

Section 64.702 of the Commission's Rules and Regulations, 77 F.C.C.2d 384 (1980) ("*Computer II*"), *aff'd*, *Computer and Communications Industry Ass'n* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). Because ISPs are providers of enhanced or information services, the services of ISPs are unquestionably jurisdictionally interstate services. *See, e.g.*, *MTS and WATS Market Structure*, 97 FCC Rcd. 682, 711, 715 (1983), *aff'd*, *NARUC* v. *FCC*, 737 F.2d 1095, 1136-37 (D.C. Cir. 1984); *Petition for Emergency Relief and Declaratory Ruling Filed by the BellSouth Corp.*, 7 FCC Rcd. 1619, 1620-21 (1992) ("*BellSouth MemoryCall*"); *GTE ADSL Tariff Order*, 13 FCC Rcd. 22466, 22474-79 (1998). As with traditional telecommunications traffic, the fact that there may be intermediate points of switching or exchange is irrelevant to the analysis. *BellSouth MemoryCall*, 7 FCC Rcd. at 1621. For example, in analyzing the jurisdictional status of a voicemail service that could be accessed from out of state, the Commission held that "the language of the Act also contradicts the narrow reading of our jurisdiction urged by the states that would artificially terminate our jurisdiction at the local switch and ignore the 'forwarding and delivery of [the] communications' to the 'instrumentalities, facilities, apparatus and services' that comprise BellSouth's voice mail service." *Id.* As the Commission explained, "the communications from the out-of-state caller to the local telephone number and switch, its forwarding to the voice mail service by the local switch, and its receipt and interaction with BellSouth's voice mail service, fall within the explicit subject matter jurisdiction of this Commission." *Id.*

Similarly, because the originating LEC is providing exchange access for the interstate telecommunications components of these enhanced and information services, the LECs' carriage of ISP-bound traffic, too, is an interstate service. *See, e.g.*, *New York Tel. Co.* v. *FCC*, 631 F.2d 1059, 1066 (2d Cir. 1980); *NARUC* v. *FCC*, 746 F.2d 1492, 1498 (D.C. Cir.

1984). In this regard, LEXIS and Westlaw are information services that use a similar architecture. Each has established local nodes that can be accessed by dialing 7 digit or 800 numbers, and once the end user reaches the local node, it can sequentially search databases that are stored in one or more regional or centrally-located computers that are located in other states. The services that LEXIS and Westlaw offer are provisioned much like Internet access (*cf. Bell Atlantic*, 206 F.3d at 6), these services, and the LECs' carriage of traffic to and from them, are interstate communications by wire or radio that are within the Commission's core interstate jurisdiction.

These same points are also established by the Commission's decision in *Teleconnect Co.* v. *Bell Telephone Co.*, 10 FCC Rcd. 1626 (1995), *aff'd* 116 F.3d 593 (D.C. Cir. 1997). *Teleconnect* held that intrastate calls placed to an interexchange carrier's calling card platform (using an 800 number) are jurisdictionally interstate because the caller can and typically does place interstate calls from the platform. Contrary to the suggestion in the D.C. Circuit's opinion (206 F.3d at 6), the service in *Teleconnect* no more "involved a single continuous communication" than do the ISP services at issue here. Once an end user reaches an interexchange carrier's calling card platform, he or she is free to make a series of calls to a number of recipients, just as an end user is free to obtain connections to multiple websites after it reaches an ISP's local server. Thus, while *Teleconnect* did not involve information services and reciprocal compensation, its jurisdictional holding is controlling, and there is no question that the Commission's prior determination of jurisdiction is correct.

II. ISP-BOUND TRAFFIC IS SUBJECT TO RECIPROCAL COMPENSATION UNDER BOTH THE TERMS OF THE ACT AND THE COMMISSION'S REGULATION.

As the D.C. Circuit squarely held, the fact that ISP-bound calls are jurisdictionally interstate does not address or resolve the question whether cost-based reciprocal compensation obligations apply to these calls. Rather, a determination that the calls are within the interstate jurisdiction establishes only that ISP-bound traffic is to be regulated under federal standards and not state law. A finding of federal jurisdiction in no way establishes that this traffic can rationally be excluded from the *federal* reciprocal compensation requirements of § 251(b)(5) or subjected (as incumbent LECs urge) to the same system of inter-carrier compensation that governs LECs' carriage of ordinary long distance calls.

As the D.C. Circuit suggested, that result does not "make sense in terms of the statute or the Commission's regulations." *Bell Atlantic*, 206 F.3d at 3. Section 251(b)(5), by its terms, requires reciprocal compensation for the transport and termination of all "telecommunications," and ISP-bound traffic is assuredly telecommunications. To be sure, the FCC's current regulations purport to establish an exception to the statute's plain terms and to limit reciprocal compensation to the termination of "local" calls. However, the stated reason for this exception was to preserve the existing system of "access charges" in which interexchange carriers compensate the originating and terminating LECs for their services at rates that purportedly contribute to the maintenance of universal service. But despite the similarity in the ISP's use of local networks, ISP-bound traffic has never been subject to the system of access charges. Rather, although treated as "interstate" for jurisdictional purposes, ISP-bound traffic has always been treated as *"local" for purposes of payment of compensation to LECs.* Thus, the terms of the Act, the reasons for the Commission's existing regulation, and the uniform prior decisions of the Commission alike all mandate that § 251(b)(5) reciprocal compensation obligations apply to ISP-bound traffic.

A. The Statutory Terms Mandate Reciprocal Compensation For ISP-Bound Calls.

Section 251(b)(5) imposes on all LECs the "duty to establish reciprocal compensation arrangements for the transport and termination of *telecommunications*." "Telecommunications" is a defined term in the Act (47 U.S.C. § 153(43)), and it is undisputed that both DSL and dial-up ISP-bound traffic are "telecommunications." Under the terms of the statute, cost-based reciprocal compensation is therefore mandatory, regardless of whether ISP-bound traffic is classified as "local," "interexchange service," "exchange service," "exchange access services," "information access," or some other kind of traffic. Indeed, because the terms "exchange" and "exchange access" appear in other provisions of §§ 251(b) and (c) – and because the other of the foregoing terms appear elsewhere in the 1996 Act – it could scarcely be clearer that Congress' use of the term "telecommunications" in § 251(b)(5) was deliberate. Had Congress intended to limit reciprocal compensation to "local" calls or to "exchange services," Congress could and would have said so.

In its 1996 *Local Competition Order*, the Commission adopted a regulation that exempted all but "local" traffic from the reciprocal compensation obligation. The stated reasons for the rule were to preserve the existing system in which interexchange carriers paid LECs access charges for originating and for terminating long distance calls. In rejecting claims that Section 251(b)(5) entitled IXCs to receive reciprocal compensation for long-distance traffic, the Commission found that "[t]he Act preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long-distance traffic." *Local Competition Order* ¶ 1033. It further concluded that access charges "were developed to address the situation in which three carriers – typically the originating LEC, the IXC, and the terminating LEC – collaborate to complete a long-distance call," whereas reciprocal compensation was intended for the situation where two carriers collaborate to complete a local call. *Local Competition Order* ¶ 1034. In support of this interpretation, the Commission also expressed the concern that the Act's cost-based standards for transport and termination (§ 252(d)(2)(A)(i)) would undermine the support that access charges provide for universal service. *Id.* But the Act separately addresses that issue. As the Commission noted, § 251(g) required LECs to continue to provide access for interexchange services pursuant to rules that applied at the time of the enactment of the 1996 Act – until such time as superceding regulations are adopted. *Local Competition Order* ¶ 1034.[2] Thus, applying § 251(b)(5) as written would not threaten legacy access charge regulation.

The Commission's "local" limitation violates the unambiguous terms of § 251(b) and should therefore be vacated. *See AT&T* v. *FCC*, 978 F.2d 727 (D.C. Cir. 1992). Further, the regulation is premised on a distinction between local and long distance carriers that is rapidly being eliminated. As the Commission itself noted in the *Local Competition Order* (¶ 1033), the transport and termination of both local and long-distance traffic "involves the same network functions" and the rates for such services "[u]ltimately . . . should converge." Although § 251(g) permits the Commission to implement a transition from traditional access charges to the cost-based compensation required by § 251(b)(5) – and the Commission is effectuating an orderly transition in that direction, most recently in its order adopting the CALLS Plan – modifying its

[2] As the Commission recently held in its *Order on Remand* in the Advanced Services Docket, § 251(g) is merely a transitional provision that incorporates pre-Act terms by necessity, but which does not indicate a Congressional intent to preserve forever the pre-Act access charge mechanisms. *Order on Remand*, In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket Nos. 98-147, 98-11, 98-26, 98-32, 98-78, 98-91, FCC 99-413, 15 FCC Rcd. 385 (1999), ¶ 47. In other words, § 251(g) reflects Congress' understanding that a flash-cut to a reciprocal compensation regime for access charges on the date of enactment would have been too disruptive to the industry. Section 251(g) thus permits the

reciprocal compensation rules to encompass ISP-bound traffic will in no way undermine that transition, inasmuch as ISPs have never paid traditional access charges.

B. ISP-Bound Traffic Has Been Treated As Local Under The *Local Competition Order* And The Commission's Uniform Prior Decisions.

ISP-bound traffic has, in any event, always been treated as "local" for analogous purposes under the Commission's prior decisions and the terms of the *Local Competition Order*. The simple reality is that, even if valid, the reasons that led the Commission to exclude traditional interexchange traffic from the scope of § 251(b)(5) do not apply in the context of ISP-bound traffic. The Commission has *never* required information service providers to pay access charges; they have always been exempted from paying such charges. In short, notwithstanding the fact that ISP-bound traffic is jurisdictionally interstate, for regulatory purposes the Commission has always *treated* that traffic as local, and the Commission has yet to offer a justification for not similarly treating that traffic as local for purposes of reciprocal compensation. *See Declaratory Ruling* ¶ 5 ("the Commission continues to discharge its interstate regulatory obligations by treating ISP-bound traffic as though it were local"); *Southwestern Bell Tel. Co.* v. *FCC*, 153 F.3d 523, 541-44 (8th Cir. 1998) (upholding retention of ESP exemption).

Indeed, by the Commission's own admission, the FCC has never prescribed a federal rule for compensation of ISP-bound traffic. *Declaratory Ruling* ¶¶ 1, 9. Therefore, even if § 251(g) can be read as a provision temporarily grandfathering traditional access charges, there is no pre-existing rule of compensation for ISP-bound traffic that falls within that grandfathering clause, and thus § 251(b)(5) should apply with full force to ISP-bound traffic.

Commission to effectuate a transition from the current access charge regime to the reciprocal compensation regime mandated by § 251(b)(5) for all "telecommunications."

Largely because of the ESP exemption, ISP-bound traffic has the characteristics that the Commission found in the *Local Competition Order* make reciprocal compensation arrangements feasible, as opposed to traditional interexchange access. For example, reciprocal compensation in the ISP-traffic context typically involves two LECs handing off traffic within a single exchange. Similar to the situation involving concededly "local" calls, as the Commission characterized it, the end-user "pays charges to the originating carrier, and the originating carrier must compensate the terminating carrier for completing the call." *Local Competition Order* ¶ 1034. It is also highly relevant that ISPs obtain service out of the same intrastate business tariffs used by other local businesses and that incumbent LECs rate calls to ISPs as local calls. *See Declaratory Ruling* ¶ 5; *Southwestern Bell*, 153 F.3d at 542. Moreover, "incumbent LEC expenses and revenue associated with ISP-bound traffic traditionally have been characterized as intrastate for separations purposes." *Declaratory Ruling* ¶ 5. And, the terms of § 251(d)(2)(A)(i) fit easily in the context of ISP traffic. In contrast to interexchange traffic, cost-based reciprocal compensation arrangements are appropriate between LECs and CLECs for the "recovery by each carrier of costs associated with transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier." § 252(d)(2)(A)(i); *see Local Competition Order* ¶ 1034.

Because the ESP exemption results in the treatment of ISP-bound traffic as local, the vast majority of state commissions – both before and after the *Declaratory Ruling* – have ruled that LECs owe cost-based reciprocal compensation for such traffic, just as they do for other local calls. Indeed, in the year since the *Declaratory Ruling*, at least thirteen states have ordered reciprocal compensation for such traffic, consistent with the Commission's rules establishing that

ISP-bound traffic is to be regulated as if it were a local call rather than as traditional interstate access.[3]

Treatment of ISP-bound traffic as local for purposes of tariffing, ratesetting and separations but not for purposes of reciprocal compensation would introduce an arbitrary and potentially crippling anomaly into the Commission's current ESP exemption regime. As most states have held, treatment of such traffic as local necessitates compensation arrangements when two LECs collaborate to complete the call, just as is true for other local calls; any contrary ruling would undermine the ESP exemption and the underlying policy of "foster[ing] and preserv[ing] the dynamic market for Internet-related services." *Declaratory Ruling* ¶ 6. The Commission should therefore recognize that ISP-bound traffic *is* local for purposes of § 251(b)(5)'s cost-based reciprocal compensation obligations.

III. IF THE COMMISSION DETERMINES THAT ISP-BOUND TRAFFIC IS BEYOND THE SCOPE OF § 251(B)(5), IT SHOULD ADOPT A NEW NATIONAL RULE THAT REQUIRES RECIPROCAL COMPENSATION FOR THAT TRAFFIC AT THE SAME COST-BASED RATES THAT CARRIERS AND STATE COMMISSIONS ESTABLISH FOR "LOCAL" VOICE AND DATA TRAFFIC.

If the Commission nonetheless concludes that § 251(b)(5) does not apply to ISP-bound traffic, it should immediately adopt a new federal rule, pursuant to its § 201/202 authority, that mandates reciprocal compensation for ISP-bound traffic at the same cost-based rates established by state commissions for the voice and data traffic that is concededly subject to

[3] *See, e.g.*, Arbitration Award, *Proceeding to Examine Reciprocal Compensation Pursuant to Section 252 of the Federal Telecommunications Act of 1996*, Docket No. 21982 (Pub. Util. Comm'n of Texas) (July 2000); Order Directing Reciprocal Compensation Rate, *Proceeding on Motion of the Commission to Examine Reciprocal Compensation: Filing of Cablevision Lightpath, Inc., to Rebut the Presumption That a Substantial Portion of Terminated Traffic is Subject to Compensation at End-Office Rate*, Case 99-C-0529 (N.Y. Pub. Serv. Comm.) (December 9, 1999). The other eleven states are Alabama, California, Florida, Georgia, Illinois, Kentucky, North Carolina, Nevada, Oregon, Pennsylvania, and Tennessee.

§ 251(b)(5). As AT&T and others have previously shown, and as no commenter has refuted, the relevant costs of delivering ISP-bound traffic are the same as the costs for delivering any other local traffic.

A. There Is No Economically Rational Or Lawful Basis For Distinguishing Between Local Voice And Data Traffic And ISP-Bound Traffic In Determining Reciprocal Compensation Obligations.

As the record in the *Declaratory Ruling* proceeding demonstrated, a LEC incurs real and significant costs in delivering traffic to an ISP, and there accordingly must be some mechanism that compensates the carrier delivering such traffic when traffic exchanged between the originating and delivering carrier is not roughly in balance. It is thus beyond reasonable debate that inter-carrier compensation should extend to ISP-bound traffic, and, absent demonstrated and categorical delivery cost differences between ISP-bound and local traffic, that carriers should apply the same pro-competitive compensation arrangements to both types of traffic – as carriers have, in fact, done for years under both negotiated and arbitrated arrangements and with the blessing of state commissions and the courts.

No such cost differences have been demonstrated, and there is simply no economic justification for subjecting voice and data traffic to different compensation rules. Consistent with its conclusions in the *Local Competition Order*, the Commission should require that inter-carrier compensation rates for ISP-bound traffic be based on the "cost" that "LECs incur . . . when delivering traffic to an ISP that originates on another LEC's network." *NPRM* ¶ 29. Indeed, only a methodology that focuses on the costs of delivery will produce the "efficient" rates that the Commission has set as a goal. *NPRM* ¶ 29 (concluding that "efficient rates" must "reflect accurately how costs are incurred for delivering ISP-bound traffic"). Incumbent LECs still have never shown, and cannot show, that the costs of transporting and terminating data traffic differ categorically from the costs of transporting and terminating ordinary voice traffic. *See* AT&T Reply Comments at 5.

Carriers, including CLECs, utilize the same equipment and facilities to terminate ISP-bound traffic as they do for conventional voice traffic bound for other business users with large volumes of inbound traffic. *See* Declaration of Lee Selwyn and Patricia Kravtin ("*Selwyn/Kravtin*") ¶¶ 22-27; and *see id.* ¶ 24 ("routing a call from an originating end-user to an ISP's incoming modem line is technically identical to routing a call from the same end-user to any local telephone number served by the incumbent or other LEC") (attached hereto). The Commission itself correctly recognized that such calls are carried "(1) by the originating LEC from the end user to the point of interconnection (POI) with the LEC serving the ISP; [and] (2) by the LEC serving the ISP from the LEC-LEC POI to the ISP's local server" over the CLEC's transport, switching, and termination equipment and facilities. *NPRM* ¶ 7. Voice traffic delivered to large business end users such as credit card-issuing banks, travel agents, and PBX users are typically terminated in precisely the same way, and utilizing precisely the same types of equipment.[4] Because the costs associated with terminating ISP-bound traffic are therefore substantially identical to the costs associated with terminating other voice and data traffic to such customers, the incumbent LECs' arguments for different compensation rates are baseless and should be rejected. *See Selwyn/Kravtin* ¶¶ 24-27 (showing that the same sequence of events occurs in the network whether the call is a voice call, data call, or call to an ISP).

Moreover, as AT&T and others showed in response to last year's *NPRM*, any compensation scheme that required carriers separately to identify, measure, and bill for ISP-

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[4] *Cf. Local Competition Order* ¶ 1033 ("We recognize that transport and termination of traffic, whether it originates locally or from a distant exchange, involves the same network functions"

bound traffic would be unjustifiably costly and time-consuming. Neither the incumbent LECs' nor the CLECs' switches or other equipment have been designed to distinguish between circuit-switched "data" traffic and circuit-switched "voice" traffic. From the perspective of a carrier's equipment, data and voice traffic handled by conventional circuit-switched networks are indistinguishable. Moreover, neither ILECs nor CLECs generally impose usage restrictions on their customers that would enable them to assure that certain numbers are used only for certain types of traffic. For these reasons, requiring carriers to settle ISP-bound traffic at different rates than voice traffic would impose needless and substantial development and deployment costs on terminating carriers.

The incumbent LECs' more recent claims that CLECs' costs of terminating ISP-bound traffic are lower because of the supposed longer duration of such calls relative to the average voice call are also meritless. *See* Taylor, Ross, Banerjee (NERA), "An Economic and Policy Analysis of Efficient Intercarrier Compensation Mechanisms for ISP-Bound Traffic," November 12, 1999 ("NERA Report"). Specifically, the NERA Report ignores the fact that CLEC networks typically consist of relatively more transport and relatively less switching than is true of ILEC networks. *See Selwyn/Kravtin* ¶¶ 38-42. Thus, while the cost of call setup may be higher than the incremental per-minute cost of the call in an ILEC network (and there is evidence that this is so), the reverse is typically true in the CLEC network. As a result, the incumbent LECs cannot show that call duration would significantly affect the total per-minute cost of delivering a call in the typical CLEC network. *See id.* ¶¶ 28-35.

Similarly, the incumbent LECs have failed to prove their contention that CLEC costs are lower because of traffic load characteristics, because they again ignore important

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and that therefore "the rates that local carriers impose for the transport and termination of local network differences. The incumbent LECs assert (without support) that less of the overall volume of ISP traffic occurs during the incumbents' traditional busy hour (when the incremental cost of call is higher), and from that premise hypothesize that CLECs would experience lower busy-hour demand and thus lower costs for serving the same volume of traffic under a more sharply-peaking traffic load profile. As Selwyn and Kravtin show, however, the opposite is in fact true. For the CLECs, whose traffic may consist of a higher proportion of ISP-bound traffic, the ISP-bound call will have a higher likelihood of being carried at peak times and will carry a *higher* incremental cost per minute on average than voice traffic carried on the ILECs' network. *Selwyn/Kravtin* ¶¶ 32-35.[5] Moreover, as Selwyn and Kravtin show, because of differences in the architecture and scale economies of incumbent LEC and CLEC networks, CLECs may actually have *higher* terminating costs on average than ILECs. *Selwyn/Kravtin* ¶¶ 38-41.

Even more baseless are the incumbents' claims that a different compensation scheme is justified based on their own allegedly higher costs of *originating* ISP-bound traffic.

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traffic and for the transport and termination of long distance traffic should converge").

[5] As AT&T also showed, the incumbents' earlier attempts to demonstrate that carriers incur different costs *delivering* ISP and voice traffic are also baseless because they depend on the assumption that CLECs are providing exclusively or predominantly terminating service to ISP customers, rather than a mix of voice and data traffic. *See, e.g.*, Affidavit of Lawrence J. Chu at ¶¶ 4-5 *Complaint of WorldCom Technologies, Inc. against New England Tel. & Tel. Co.*, No. 97-116-B (Mass. Dep't. of Telecomm. & Energy, Mar. 29, 1999) (stating only that "CLECs that terminate *virtually all* traffic as ISP-bound calls . . . do not require the normal complement of line and trunk modules that are used in LEC or CLEC networks to provide dial tone and ringing to end users that make and receive calls" (emphasis added), and that broad-based CLECs "typically . . . equip their switches with the same end user software that is resident in ILEC switches"). Even if the incumbents could substantiate their assertion of cost differences with respect to niche entrants who have focused their marketing efforts exclusively on ISPs, it would plainly be improper for the Commission to base its general rule on the exceptional case. As the Commission held in the *Declaratory Ruling*, "the state commissions are capable of assessing whether and to what extent these and other anomalous practices are inconsistent with the statutory scheme (*e.g.*, definition of a carrier) and thereby outside the scope of any determination regarding inter-carrier compensation." *Declaratory Ruling* ¶ 24 & n.78.

See, e.g., U S WEST's Opening Comments at 17, *Investigation of Internet Serve Providers Traffic*, No. C-1960//PJ-25 (Neb. PSC, Mar. 15, 1999) (suggesting that the flat rates ILECs typically charge end users are inadequate because the ISP-bound calls originated by the incumbents' end users allegedly have higher than average holding times). Such concerns are simply irrelevant. The only relevant factor in determining rates that adequately compensate a carrier for the use of its facilities in transporting and terminating traffic is the cost that the *terminating* carrier incurs in delivering the ISP-bound traffic. *Selwyn/Kravtin* ¶ 17 (whether incumbents are being adequately compensated for *origination* of ISP-bound calls "is plainly not relevant to the question of whether CLECs are being overcompensated for the *termination* of such traffic"). If a LEC believes that its retail rates are improperly structured to reflect its costs of originating calls, the LEC should seek permission to modify those rates.[6]

Similarly, the Commission's observation that "efficient rates for inter-carrier compensation for ISP-bound traffic are not likely to be based entirely on minute-of-use pricing structures," and that "flat-rated pricing based on capacity may be more cost-based" for at least some components of service also provides no reason to allow disparate treatment of ISP-bound traffic. In the *Local Competition Order*, the Commission recognized that "economic efficiency may generally be maximized when non-traffic sensitive services, such as the use of dedicated facilities for the transport of traffic, are priced on a flat-rated basis." *Local Competition Order* ¶ 1063. Consistent with those findings, the Commission's existing reciprocal compensation pricing rules generally require that the rate structures adopted by the state commissions reflect

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[6] *See Selwyn/Kravtin* ¶ 18. Although the incumbents repeatedly complain that their end user rates are set too low to recover costs for customers with above-average internet usage, the ILECs simply ignore that where states have established uniform flat rates for local exchange service, those rates are necessarily based on the costs of serving a customer with *average* cost

the manner in which costs are incurred. *See* 47 C.F.R. § 51.709. These rules are sufficiently flexible to allow state commissions to require alternative pricing structures if they determine that such structures are appropriate, but there is no basis for singling out ISP-bound traffic for special treatment.

In short, as AT&T amply demonstrated and as no commenter has refuted, there is no rational economic basis for subjecting voice and data traffic to different compensation regimes. The Commission should order that ISP-bound traffic be settled on the same basis as other voice and data traffic.

B. The Commission Should Adopt A Simple National Rule That Requires Compensation For ISP-Bound Traffic At The Same Cost-Based Rates That States Establish For "Local" Voice And Data Traffic.

The Commission's existing reciprocal compensation rules authorize state commissions to "impose bill-and-keep arrangements" if the amount of traffic flowing in one direction "is roughly balanced" with the amount of traffic flowing in the opposite direction, "and is expected to remain so." 47 C.F.R. §§ 51.705(a), 51.713(b). Where traffic is not "roughly balanced," the Commission's rules require states to establish rates on the basis of "the forward-looking economic costs" of delivering the traffic. *See* 47 C.F.R. § 51.705(a)(1). Because "[s]ymmetrical compensation rates are [] administratively easier to derive and manage than asymmetrical rates based on the costs of each of the respective carriers," the Commission's rules require "reciprocal compensation" to "be based on the incumbent local exchange carrier's cost studies," unless the competitive local exchange carrier demonstrates that its costs of termination justify imposing ***higher*** rates than those charged by the incumbent. *See Local Competition Order* §§ 1088-89 (emphasis added); 47 C.F.R. § 51.711(b) (state commission may establish

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characteristics. By definition, an average rate will undercompensate carriers for service to above-cost customers, and overcompensate carriers for lower-cost customers.

asymmetrical rates "only if" the entrant's costs are proven to be higher than the incumbent's costs). Finally, the Commission's rules require that rate structures reflect "the manner that carriers incur those costs." 47 C.F.R. § 51.709. Because there is no relevant functional difference between ISP-bound traffic and traffic that is concededly within the scope of § 251(b)(5) and thus subject to these rules, the appropriate federal rule is to mandate these same compensation obligations for ISP-bound traffic.

As AT&T explained last year (Reply Comments at 14), there is a simple and straightforward way to accomplish that result in the event the Commission determines that ISP-bound traffic is not already within the scope of § 251(b)(5). Specifically, the Commission should adopt the following rule:

> The rates, terms, and conditions for the transport and termination of ISP-bound traffic between any two carriers in a state shall be the rates, terms, and conditions established or approved by the state commission in such state (or the parties through negotiation) for the transport and termination of local traffic between the two carriers pursuant to Sections 251 and 252 of the Act.

Such a rule would significantly reduce the transaction and litigation costs of entry, enhance the ability of carriers to adopt region-wide or national entry strategies, and facilitate entry by providing carriers and financial markets with greater outcome predictability.

This rule would have the added benefit of avoiding wasteful federal proceedings that are duplicative of state commission § 252 proceedings, while at the same time imposing no additional obligations on the states (that ILECs would undoubtedly, as they did in the D.C. Circuit, argue are beyond the states' § 252 jurisdiction). Indeed, there would be no additional work for *any* regulator – enforcement proceedings at the Commission presumably would arise only in the extraordinary case in which an incumbent LEC refused to pay compensation despite an unambiguous Commission rule requiring payment. By contrast, if the Commission were to